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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 OLIVIA R. HOLMAN,

8 Plaintiff(s),

Case No. 2:18-CV-2334 JCM (NJK)

ORDER

9 v.

10 ANDREW SAUL,

11 Defendant(s).

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13 Presently before the court is Magistrate Judge Koppe's report and recommendation  
14 ("R&R") granting commissioner's counter motion to affirm and denying plaintiff's motion for  
15 remand. (ECF No. 25). Plaintiff Heidi M. Johnson ("plaintiff") objected to the R&R.<sup>1</sup> (ECF No.  
16 26). Defendant Andrew Saul ("the commissioner") did not respond, and the time to do so has  
17 passed.

18 Also before the court is plaintiff's motion to remand (ECF No. 18), to which the  
19 commissioner responded (ECF No. 22).

20 Also before the court is the commissioner's counter motion to affirm (ECF No. 21), to  
21 which plaintiff responded (ECF No. 24).

22 **I. Background**

23 The parties do not object to the factual presentation in the R&R. Therefore, the court adopts  
24 the factual representation in the R&R and will detail factual and procedural background in the  
25 discussion section of this order as necessary to explain the court's holding.  
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28 <sup>1</sup> Nancy Berryhill was the named defendant while she was Acting Commissioner of the  
Social Security Administration. (See ECF Nos. 21; 22). Andrew Saul is now Commissioner of  
the Social Security Administration and is defending this suit accordingly. (ECF No. 23).

## 1      **II.      Legal Standard**

2            A party may file specific written objections to the findings and recommendations of a  
3      United States magistrate judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B);  
4      LR IB 3-2. Where a party timely objects to a magistrate judge’s report and recommendation, the  
5      court is required to “make a *de novo* determination of those portions of the [report and  
6      recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1). The court “may accept,  
7      reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.”  
8      *Id.*

9            Pursuant to Local Rule IB 3-2(a), a party may object to the report and recommendation of  
10     a magistrate judge within fourteen (14) days from the date of service of the findings and  
11     recommendations. Similarly, Local Rule 7-2 provides that a party must file an opposition to a  
12     motion within fourteen (14) days after service thereof.

## 13     **III.      Discussion**

14           Judge Koppe aptly described the five-step evaluation process ALJs use to determine  
15     whether an individual is disabled. (ECF No. 25 at 3–5); *see also Bowen v. Yuckert*, 482 U.S. 137,  
16     140 (1987) (citing 20 C.F.R. §§ 404.1520, 416.920). As Judge Koppe explained:

17                Before considering step four of the sequential evaluation process,  
18                the ALJ must first determine the individual’s residual functional  
19                capacity (“RFC”). 20 C.F.R. § 416.920(e). The RFC is a function-  
20                by-function assessment of the individual’s ability to do physical and  
21                mental work-related activities on a sustained basis despite  
22                limitations from impairments. SSR 96-8p. In making this finding,  
23                the ALJ must consider all of the symptoms, including pain, and the  
24                extent to which the symptoms can reasonably be accepted as  
25                consistent with the objective medical evidence and other evidence.  
26                20 C.F.R. § 416.929; SSR 16-3p. To the extent that statements about  
27                the intensity, persistence, or functionally-limiting effects of pain or  
28                other symptoms are not substantiated by objective medical  
                     evidence, the ALJ must make a finding on the credibility of the  
                     individual’s statements based on a consideration of the entire case  
                     record. The ALJ must also consider opinion evidence in accordance  
                     with the requirements of 20 C.F.R. § 416.927.

26           (ECF No. 25 at 4). Here, the parties dispute the ALJ’s determination of plaintiff’s “residual  
27     functional capacity” (“RFC”). (*See generally* ECF Nos. 18; 21; 24).

1 The Social Security Administration classifies jobs as “sedentary, light, medium, heavy, and  
2 very heavy.” 20 C.F.R. §§ 404.1567(b), 416.967(b). A job is considered light work “when it  
3 requires a good deal of walking or standing . . . .” *Id.* A sedentary job, on the other hand, “is  
4 defined as one which involves sitting,” although walking and standing may be required  
5 occasionally. *Id.*

6 The vocational expert indicated that plaintiff’s prior work as a bus person is classified as  
7 “medium exertion,” but that “it appears that it was actually performed at the light level . . . .” (ECF  
8 No. 16-1 at 57). When asking the vocational expert a hypothetical, the ALJ specifically mentioned  
9 that plaintiff’s ability to “stand, sit, and walk a total of two hours of an eight hour day, 20 minutes  
10 maximum at one time on her feet” would “[o]bviously . . . preclude her past work because she was  
11 on her feet a lot longer than that time frame.” *Id.* at 65. Indeed, the ALJ ultimately concluded that  
12 “[t]he [plaintiff] is unable to perform any past relevant work.” *Id.* at 41. To that end, the ALJ  
13 asked the vocational expert for examples of “very sedentary” positions. *Id.* at 65

14 At the hearing, the vocational expert indicated that plaintiff would need “sedentary,  
15 unskilled employment.” *Id.* at 66. She suggested “small parts assembler,” which has a strength  
16 rating of light work. *Id.* Although plaintiff was “obviously precluded” from her past work—which  
17 was labeled medium exertion but was performed as light work—the vocational expert also  
18 recommended “hand packager,” which is technically a medium-exertion job which labor market  
19 studies suggest is “performed at the sedentary level” in “a certain percentage.”<sup>2</sup> *Id.*

20 Further, the ALJ claimed to accord “great weight” to the opinions of Dr. Rene Pena and  
21 Dr. Leonard Simpson because they were “consistent with the medical evidence of record.” *Id.* at  
22 44. Both Dr. Pena and Dr. Simpson determined that plaintiff’s RFC allowed only sedentary work.  
23 *Id.* at 80, 90, 106, 118. Nonetheless, the ALJ determined that plaintiff’s RFC allowed her to  
24 perform light work, although he noted that “[plaintiff]’s ability to perform all or substantially all  
25 of the requirements of [light] work has been impeded by additional limitations.” *Id.* at 46.

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28 <sup>2</sup> The vocational expert indicated that she provided the ALJ with the “certain percentage,”  
but the ALJ does not reference that percentage in his findings, and that percentage is not elsewhere  
in the record. (*See* ECF No. 16-1 at 66).

Regardless of the weight—or lack thereof—that the ALJ gave plaintiff’s subjective testimony, the court finds that the ALJ’s determination of plaintiff’s RFC is not supported by substantial evidence. To the contrary, the ALJ’s determination is unsupported by the opinions of Dr. Pena and Dr. Simpson, the evidence that he supposedly relied on and gave great weight to. Every indication in the record is that plaintiff’s RFC was limited to sedentary work, including the ALJ’s representations at the hearing and his conclusion that plaintiff cannot perform any past relevant work.

Accordingly, the court finds that remand is appropriate.<sup>3</sup>

## IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Judge Koppe's R&R (ECF No. 25) be, and the same hereby is, OVERRULED, consistent with the foregoing.

IT IS FURTHER ORDERED that plaintiff's motion to remand (ECF No. 18) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that the commissioner's cross motion to affirm (ECF No. 21) be, and the same hereby is, DENIED

IT IS FURTHER ORDERED that the matter of *Holman v. Saul*, case number 2:18-cv-02334-JCM-NJK, be, and the same hereby is, REMANDED to the Social Security Administration for further administrative proceedings consistent with this order.

DATED January 13, 2020.

James C. Mahan  
UNITED STATES DISTRICT JUDGE

<sup>3</sup> The court need not reach plaintiff's other objections to the R&R.